The 1997 arbitrated rates have violated TELRIC from the outset. In determining the appropriate cost of capital, for example, the PSC accepted U S West's claim it faced "substantial increases in competition and business risk" in the post-1996 competitive environment.[181] The past five years have exposed the hollowness of this claim. The relevant risks are those of Qwest's wholesale business, not its retail local business or its other, riskier ventures. These wholesale risks are low, and are likely to remain low for the foreseeable future.[182] The Commission's 1996 finding that network elements are likely to remain "bottleneck, monopoly services" without "significant competition," *Local Competition Order* ¶ 702, has only been underscored by the subsequent collapse of the CLEC sector.

C. Qwest's Has Failed To Satisfy Its Burden Of Proving That Its Colorado UNE Rates Are TELRIC-Compliant.

Qwest's Colorado UNE rates – which also are the foundation of its benchmarking analysis for the other four applicant states – result from two separate Colorado proceedings. The Colorado PUC initially set permanent Colorado interconnection and UNE rates in a July 28, 1997 order, Docket No. 96S-331T ("331T Order"). Almost one and a half years later, on November 30, 1999, Qwest (then U S WEST Communications, Inc.) filed an SGAT. Qwest's SGAT contained the rates set in the 1997 331T Order, and numerous new rates that had never been reviewed by the Colorado PUC. In response, the Colorado PUC opened Docket No. 99A-577T ("577T Proceeding"). After numerous CLECs, as well as the Colorado Office of the Consumer Counsel ("Colorado OCC") and the Colorado PUC's own staff ("CPUC Staff") opposed the SGAT, the Colorado PUC released a Procedural Order, on December 29, 2000, in the 577T Proceeding, to review the rates in the 331T Order.

[181] *See* Baker/Starr/Denney Decl. ¶ 57.

[182] *See Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218, 240-241 (D.Del. 2000).

On January 16, 2001, Qwest filed cost studies purporting to support the 331T rates, and the numerous new rates contained in the SGAT. Qwest supplemented that testimony on April 23, 2001. Then, in late July, only two weeks before the scheduled August hearings, Qwest filed a new loop cost study and a new switching cost study, and urged the Commission to adopt loop rates based on those new cost studies or, in the alternative, to incorporate the inputs from those cost studies into the HAI 5.2 cost model ("HAI Model") proposed by the CLECs. The CLECs opposed Qwest's eleventh hour filings of entirely new cost studies and inputs, noting that they could not possibly conduct sufficient discovery to fully analyze and assess Qwest's new proposal. The CLECs also sought to, at least, file rebuttal testimony showing that the new inputs proposed by Qwest were not TELRIC-compliant, and should not be incorporated into the HAI Model. The Colorado PUC denied both CLEC requests. The Colorado PUC held hearings from August 6 through August 17, 2001, and the parties filed closing Statements of Position on September 12, 2001. On December 21, 2001, the Colorado PUC issued the *Colorado Pricing Order*.[183] As explained below, the UNE rates set in that order are fundamentally flawed.

1. Qwest's Colorado NRCs Are Overstated By Clear TELRIC Errors.

The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.[184] Regardless of the level of the recurring rate, an ILEC will foreclose meaningful competition if it is allowed to increase potential competitors' costs significantly through inflated non-recurring charges. New entrant competitive carriers must pay NRCs up-front, and if NRCs are significantly overstated,

[183] Before the Public Utilities Commission of the State of Colorado, Commission Order, Docket No. 99A-577T (Mailed December 21, 2001) ("Colorado Pricing Order").

[184] *See, e.g., AT&T Communications,* 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

then potential new entrants will not be able to afford to enter the market. Moreover, higher NRCs increase the level of market risk faced by potential new competitive local exchange market entrants because the high price of entry substantially reduces the potential competitors' pricing flexibility relative to the pricing flexibility enjoyed by the incumbent, which does not have to pay the NRCs.

As explained in the attached declaration of Thomas Weiss, Qwest's Colorado NRCs – which are based on Qwest's "ENRC" cost model – are inflated by numerous clear TELRIC errors. Most notably, the NRC for a "hot cut" is inflated by more than 1000%. For every residential or business customer that a CLEC wins from Qwest, AT&T must now pay Qwest $171.88 to have that customer's line physically transferred, in coordination with Qwest, to AT&T's facilities. Those charges are way out of line when compared to those of other ILECs that have obtained Section 271 approval. For example, Verizon charges hot cut rates of $4.07, in Pennsylvania, and $35 in New Jersey and New York.[185] Qwest's hot cut rates should be no more than $13.[186]

Likewise, Qwest's "basic loop installation" NRC of $55.27 – which applies anytime a CLEC seeks to serve a new customer that is not already served by the ILEC (new customers and customers that request additional lines) – is inflated by almost 600%.[187] Qwest's rate is far higher than in other 271-approved states. In New York, New Jersey, Pennsylvania, and Georgia, Verizon's and BellSouth's corresponding Basic Install rates are only $0.13, $23.15, $3.01, and $34.22 respectively.[188] A truly TELRIC-compliant basic loop install NRC in Colorado is

[185] *See* Weiss Decl. ¶ 39.
[186] *See id.*
[187] *See* Weiss Decl. ¶ 43.
[188] *See* Weiss Decl. ¶ 42.

approximately $0.29.[189] And even Qwest's own cost NRC cost study produces a basic loop install rate of only about $8.00 after correcting for many of the TELRIC violations in that cost study.[190]

The reason that Qwest's NRCs are so overstated is that they were developed using Qwest's ENRC cost model, which contains myriad clear TELRIC errors. These errors include: (1) the improper recovery of disconnect costs at the time when a loop is initially provisioned; (2) recovery of costs for manual work activities that would be performed electronically in a forward-looking network; (3) recovery of costs for activities that are unnecessary in a forward-looking network; (4) recovery of nonrecurring costs that should be recovered through recurring rates; and (5) reliance on improperly computed time estimates for various work activities.[191] Each of these clear TELRIC errors is described in detail in Mr. Weiss' attached declaration.

2. Qwest's Colorado UNE Loops Rates Are Overstated By Clear TELRIC Errors.

The Colorado PUC correctly recognized that the cost model advanced by AT&T – the HAI Model – is capable of producing TELRIC-compliant UNE loop rates. Accordingly, the Colorado PUC stated that it would "look primarily to the HAI Model" to set Qwest's Colorado UNE loop rates.[192] However, the Colorado Commission then adopted non-TELRIC inputs to use in the HAI Model. As explained in the attached declaration of Robert Mercer and Dean Fassett ("Mercer/Fassett Decl."), a cost model is only is good as the input assumptions used. An appropriately designed forward-looking cost model will not produce forward-looking cost estimates if it is not populated with forward-looking inputs.[193] And many of the key input

[189] *See* Weiss Decl. ¶ 42.
[190] *See id.* ¶ 43.
[191] *See* Weiss Decl. ¶¶ 10-36.
[192] *See Colorado Pricing Order* at 38.
[193] *See* Mercer/Fassett Decl. ¶ 13.

values approved by the Colorado PUC, often with little or no explanation, were based upon Qwest proposals that violate fundamental TELRIC principles. As the Colorado Staff explained, "[t]he Qwest approach ignores the most fundamental TELRIC Principle: Existing costs should not be included in wholesale price calculations. Qwest includes these costs, in toto, then uses anti-competitive adjustments as a means of transforming historical costs into future costs."[194] Because the Colorado PUC failed to adopt TELRIC-compliant inputs, Qwest's rates are vastly overstated.

As one example, the Colorado PUC adopted an input for "plant mix" that substantially inflates Qwest's UNE-loop rates. Feeder and distribution facilities may be placed on aerial structures (*e.g.*, supported on telephone poles), underground (placed in conduit that is trenched underground), or buried in trenches (trenched directly into the ground). As a general matter, aerial cable placement is the least expensive – and thus would be used by an efficient competitor wherever possible – followed by buried cable. The most expensive cable placement method is underground cable.[195]

The record in the Colorado UNE pricing proceeding shows that an efficient network owner would deploy about 30 percent aerial cable (and likely more).[196] The Colorado PUC, however, adopted a split-the-baby approach. In particular, the Colorado Commission adopted an input of 20% for the proportion of Qwest's Colorado network that represents aerial cable, which is a rough average of the forward-looking distribution of aerial plant supported by the CLECs

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[194] *See* CPUC Staff RRR at 4.
[195] *See* Mercer/Fassett Decl. ¶ 27.
[196] *See* Mercer/Fassett Decl. ¶ 28.

(about 30%) and the portion of aerial cable that exists in Qwest's existing network (about 12%).[197] This clear TELRIC error overstates loop costs by at least $0.80.

To make matters worse, when the Colorado PUC improperly reduced the percentage of aerial plant used in the HAI Model from about 30% to 20%, it allowed Qwest to split the 10% of cable that remained unallocated after this adjustment equally between buried plant and the most expensive structure, underground plant.[198] Even if there was some basis for reducing aerial plant below 30 percent, there is no possible basis for substituting a substantial amount of underground plant; rather, any such substitution would be to the next cheapest solution, buried plant.[199] Thus, at the same time that the Colorado PUC arbitrarily lowered the percentage of aerial cable plant, it arbitrarily increased the percentage of expensive underground cable plant. This clear TELRIC error inflates Qwest's UNE loop rates by an additional $0.48.

As explained in the attached declaration of Robert Mercer and Dean Fassett (¶¶ 36-65), there are numerous other non-TELRIC inputs that substantially inflate Qwest's non-loop UNE rates including: (1) failure to adopt appropriate route distances for distribution cable; (2) massively inflated estimates for the amount of cable required for "drops"; (3) overstated network expense factors; and (4) adoption of substantially overstated rates for plow (in order to bury cable). The combined effect of all of these TELRIC-errors is that Qwest's Colorado UNE loop rates are overstated by at least $2.00 above TELRIC levels.[200]

3. Qwest's Colorado Switching Rates Are Overstated By Clear TELRIC Errors.

In the *Colorado Pricing Order*, the Colorado Commission recognized that the rates in the *331T Order* were stale, and did not reflect did not reflect "the changes in technology, the

[197] *See* Mercer/Fassett Decl. ¶ 32.

[198] *See Colorado Reconsideration Pricing Order* at 32.

[199] *See* Mercer/Fassett Decl. ¶¶ 34-35.

regulatory field, or the merger of U S WEST with Qwest."[201] However, the Colorado PUC ignored the substantial evidence submitted by AT&T and other CLECs identifying TELRIC-compliant switching rates, and said only that "[t]he record of the 99A-577T does not support a determination by the Commission of final local switching rates."[202] Based on these "findings," the Colorado PUC left the inflated rates set in the 1997 *331T Proceeding* in place on an "interim" basis.

Recognizing that the 331T rates were overstated and would not pass muster in a federal section 271 proceeding, Qwest "voluntarily" reduced those rates. Qwest computed those new rates using the same HAI Model submitted by AT&T and other CLECs in the 577T Proceeding that the Colorado PUC found to be "insufficient," but with different input values. Because Qwest changed the HAI Model's inputs, the new rates proposed by Qwest – although lower than the 331T rates – were substantially higher than those proposed by AT&T and other parties in the 577T Proceeding. The Colorado PUC made no attempt to determine whether this new evidence was sufficient. Instead, the Colorado PUC adopted Qwest's proposed switching rates on the sole ground that they were lower than the stale 331T switching rates that the Colorado PUC had adopted in the *Colorado Pricing Order*, and that lower rates "benefit CLECs."[203]

Simply because Qwest's eleventh hour switching rates are lower than the obviously inflated 331T rates does not make them TELRIC-compliant. On the contrary, Qwest bears the

[200] *See id.*

[201] *See Colorado Pricing Order* at 25-26.

[202] *See id.*

[203] *Colorado Reconsideration Pricing Order* at 7. As pointed out by the CPUC Staff, the "record in [the 577T docket] . . . establishes that Qwest's proposed prices [*i.e.*, the 331T rates] were overstated through inappropriate cost factor calculations, use of incorrect productivity and inflation factors, and lack of inclusion of merger savings, technology improvements and business improvements." CPUC Staff RRR at 3. The structure of Qwest's switching rates "have not had a comprehensive review for over 11 years." CPUC Staff RRR at 5. And Qwest's switching rates are based on "historical costs." CPUC Staff RRR at 5. *see also id.* at 4 ("The Qwest approach ignores the most fundamental TELRIC principle: Existing costs should not be included in wholesale price calculations"). AT&T's cost study showed that the 331T recurring switching rates, were inflated by 277%.

burden of demonstrating that its new switching rates are TELRIC-compliant. Qwest has not done so, nor could it.

Qwest developed its new Colorado switching rates by changing critical inputs to the switching cost study, the HAI Model, submitted by AT&T and other CLECs in the 577T Proceeding. Those changes were never reviewed – let alone approved – by the Colorado PUC, and they produced rates that are substantially inflated above TELRIC levels.

Fill Factor. Qwest's switching cost studies improperly reduced the switching "fill factor" used in the HAI Model from 94% down to 82.5%.[204] According to Qwest, more spare capacity was necessary in order in order to cover increases in demand for switching capacity.[205] That argument is baseless. Today's switches are easily expandable. Accordingly, a proper forward-looking cost model would not invest in more switching and line port capacity than is required to have sufficient capacity to meet small unexpected increases in demand and any necessary administrative functions. Beyond that, as demand grows, it is a simple matter to install additional line port interface circuit boards to serve new subscribers.[206]

Port/Usage Split. Switch rate design has traditionally allocated a portion of switch costs to the fixed line port element and a portion to rates based on minutes of use. In accordance with

[204] The end-office switch fill factor represents the amount of capacity that the cost model assumes will be used by the switch. In the HAI Model, the fill factor determines the number of spare line port interfaces the Model will equip in a given switch. *See* Mercer/Chandler ¶ 25. The difference between the fill factor and 100% represents spare capacity that can be used to serve current and future demand for switched service. Because a small amount of spare capacity is required for administrative and other purposes, the proponents of the HAI Model supported a TELRIC-compliant fill factor is 94%.

[205] *See* Thompson Decl. ¶¶ 59-61.

[206] *See* Mercer/Chandler Decl. ¶ 28. Moreover, the HAI Model is conservatively designed, and implicitly allows for additional spare capacity beyond that reflected in the fill factor. *See id.* Modern switches can serve more than 100,000 lines. *See id.* In Colorado, for example, Qwest operates end office switches that approach this line size (Qwest's Colorado Springs Main wire center serves more than 91,000 lines). *See id.* The HAI Model, however, uses end office inputs that include a default maximum line size that is considerably smaller than 100,000 lines (or the 91,000 that Qwest uses in its network). The value for this input in the HAI Model is 80,000. When the model encounters a wire center serving more than 75,200 business and residential lines (the product of 80,000 x .94), the model adds the investment for a second switch and distributes demand equally between the two switches. Thus, the

TELRIC and the Commission's *Local Competition Order*, rates for unbundled network elements are to be established on a cost causative basis and "costs should be recovered in a manner that reflects the way they are incurred."[207] Under these cost causation principles, the portion of the switch costs that are non-usage-sensitive should be assigned to the flat-rated or fixed line port charge, and the portion of the switch costs that are usage-sensitive should be allocated to the minute-of-use rate element.[208]

The control structure of a modern end-office or tandem switch is a specialized computer.[209] Switching systems have benefited from the same profound improvements in processor performance that have been observed over the past decade in personal computers. As a result, the principal limit to the capacity of today's digital switches is not processing capacity, but rather the number of ports.[210] Given the substantial increases in capacity of today's switches, increased minutes-of-use does not result in increased switching costs.[211]

Indeed, a large portion of the total cost of a switch is associated with memory, processors, administrative and maintenance equipment and is incurred at the time a switch is placed in operation. These "getting started" costs do not vary with usage and accordingly should be assigned to the fixed port rate element. If a switch does exhaust its port capacity, then a wire center must incur the cost of a second switch. The exhaustion of the first switch's ports is the primary cause for incurring the "getting started" costs for the second switch, and these costs

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effective fill factor for the HAI model is actually much lower than 94% (*e.g.*, based on a switch that can serve 100,000, the HAI's effective fill factor is only 72.5%).

[207] *Local Competition Order* ¶ 741.

[208] *See* Mercer/Chandler Decl. ¶¶ 30-38.

[209] *See* Mercer/Chandler Decl. ¶ 32.

[210] *See id.*

[211] *See id.*

should also be assigned to the port. Thus, the majority of the cost of today's generation of digital switches is driven by ports, not by usage, and should be recovered in the fixed port rate element.

The HAI Model submitted by AT&T in Colorado addressed these issues by updating the model to reflect a more realistic 60/40 port/usage split.[212] These values are consistent with the recent finding of the New York Public Service Commission ("NYPSC") in the recent 2002 New York UNE Decision. In that proceeding, Verizon argued for a ratio of 36% fixed/64% usage sensitive claiming that its proposal was based on cost causation and consistent with its general practices. The NYPSC rejected Verizon's arguments and ruled that only 34% of switch costs were usage sensitive and that the remaining 66% should be treated as fixed.[213] The Illinois Commission also has recognized the largely fixed nature of switching costs and has established a 100% flat-rated switch rate with no minute of use element.[214] In fact, more recent data shows that the Illinois was correct.[215] In more recent proceedings, *e.g.*, the Arizona and Minnesota UNE rate proceedings, AT&T is advocating the use of a 100/0 port usage split.

The switching rates approved by the Colorado PUC, do not reflect these forward-looking port/usage ratios. Instead, Qwest's switching rates reflect the old 30/70 port/usage ratio of costs. Qwest provides no legitimate evidence that such a split is appropriate for Colorado.[216] Overall,

[212] Older versions of the HAI Model, which was originally developed in 1997, used a 30/70 port to usage percentage split. The 30/70 split was based on the telecommunications data that was available at that time. As AT&T and other CLECs demonstrated in the 577T proceeding, however, the 30/70 port to usage split established several years ago is not appropriate for developing rates today, because that distribution of costs does not accurately reflect switch cost causation, as required by TELRIC principles. *See* Mercer/Chandler Decl. ¶ 31.

[213] Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case No. 98-C-1357, Order on Unbundled Network Element Rates, Before the NYPSC, at 34-36 (January 28, 2002).

[214] *Investigation Into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection*, Network Elements, Transport, Termination of Traffic, Docket Nos. 96-0486 & 96-0569 (con.), 1998 Ill. PUC LEXIS 109 (Ill. Commerce Commission) (Feb. 17, 1998).

[215] *See* Chandler/Mercer Decl. ¶ 34.

[216] The *only evidence* offered by Qwest in support of that ratio is that the Commission's Synthesis Cost Model for computing USF support uses that ratio. But as explained above, the 30/70 port-usage split is outdated and is not supported by the record. Moreover, the Colorado PUC has made no finding that Qwest's 30/70 port/usage split is

the Colorado PUC's misallocation of port to switching costs overstates Qwest's switching usage costs by 75%.[217]

Vertical Features. Qwest's switching port rates, which are based on the HAI Model, reflect a $0.38 add-on cost for vertical feature software.[218] Because the switch costs used in the HAI Model already account for vertical feature software costs, *see* Mercer/Chandler Decl. ¶ 40, this is a clear double count. By adding the $0.38 vertical features software costs to the port rates computed by the HAI Model ($1.15), as Qwest did to calculate its switching rates, Qwest substantially inflated the switching port rate.[219]

D. Qwest's UNE Rates Create A Discriminatory "Price Squeeze" In Violation Of Checklist Item 2.

Section 271 bars the Commission from granting Verizon long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.[220] The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the

appropriate for Colorado. Rather, the Colorado PUC adopted Qwest's rates on the basis of a logical non-sequitor – that Qwest's rates were lower than the massively overstated 331T rates.

[217] *See* Mercer/Chandler Decl. ¶ 37. The Commission's *Maine 271 Order* is not to the contrary. In the *Maine 271 Order*, the Commission determined that the Maine Commission's decision to use a 30/70 split was reasonable because: (1) the Maine Commission has discretion to determine the proper split based on the record evidence and (2) AT&T objected to the 30/70 split for the first time in opposition to Verizon's Maine Section 271 application. *See Maine 271 Order* ¶¶ 29-30. Neither of these factors exist here. The Maine commission at least addressed the appropriate port/usage split, the Colorado PUC did not. Rather, as noted above, the Colorado PUC adopted Qwest's proposed switching rates without any investigation because those rates were lower than the massively overstated 331T rates. Likewise, in contrast to the Maine state UNE rate proceeding, in which AT&T did not object to the 30/70 port/usage split, AT&T filed extensive cost studies in Colorado supporting the use of a 60/40 port/usage split. *See* Mercer/Chandler Decl. ¶ 34. And that testimony was unopposed. It was not until Qwest sought reconsideration of the *Colorado Pricing Order*, that it challenged the use of a 60/40 split.

[218] Vertical features are additional telephone related services such as Caller ID, Call Waiting, Call Forwarding, voice mail, and so on.

[219] Mercer/Chandler Dec. ¶ 40.

[220] *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

utility's retail services to any class of customers.[221] Thus, if Qwest's high end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. And because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Qwest's UNE rates in any state are discriminatory, the Application must be denied.

The Commission recently offered guidance on the type of "margin analysis" that should be employed to test whether a BOC's rates are, in fact, discriminatory. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants.[222] The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.[223]

AT&T has conducted such an analysis and it demonstrates that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Idaho, Iowa or North Dakota. State-wide average *gross* margins (not accounting for carriers' internal costs) in those states are only $5.55 (for Idaho), $4.24 (for Iowa), and $5.19 (for North Dakota).

[221] *FPC v. Conway Corp.*, 426 U.S. 271, 278-79 (1976).

[222] *See, e.g., Vermont 271 Order* ¶ 71.

[223] *See id.* ¶ 69.

Those margins do not even come close to covering an efficient carrier's internal costs of entry.[224] As demonstrated in the attached declaration of Stephen Bickley, an efficient new entrant's internal costs exceed $10.00 in each of these states.[225] After accounting for these internal costs of entry, the *net* margins that are available to new entrants in Iowa, Idaho, and North Dakota are *negative*. Thus, competitive entry is not feasible in any of these states, which confirms that Qwest's UNE rates in these states are discriminatory in violation of Checklist Item 2.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE

Qwest's joint application is deficient in a host of additional and important respects. It is plain, in most cases from the face of Qwest's SGATs, that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, all in violation of its checklist obligations. Certain state commissions in Qwest's region have acknowledged a number of these violations and forced Qwest to reform its policies in those states. Qwest's continuing failure uniformly and fully to comply with its market-opening obligations under the Act requires denial of its application.

A. Qwest Denies CLECs Nondiscriminatory Interconnection.

Section 271(c)(2)(B)(i) requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. §

[224] Qwest also filed a margin analysis. But as explained in the attached declaration of Michael Lieberman, that analysis is fundamentally flawed because it fails to account for numerous recurring costs that appear in Qwest's SGAT's. *See* Lieberman Decl. ¶¶ 46-49. Those costs include OSS costs and DUF costs. Qwest's margin analysis also fails to use state-specific minutes-of-use assumptions as required by the Commission's rules. *See id.*

[225] In the past, the Commission has questioned whether the well-known internal cost estimate is that of an efficient carrier. The answer to that question is yes. As explained by Mr. Bickley, that internal cost figure does not reflect carriers' *current* internal costs, but their forward-looking costs that accounts for future savings associated with efficiencies and increased scale. *See* Bickley Decl. ¶¶ 1-2.

271(c)(2)(B)(i).[226] Section 251(c) contains three requirements for the provision of interconnection. First, an ILEC must provide interconnection "at any technically feasible point within the carrier's network."[227] Second, an ILEC must provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[228] Finally, the ILEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[229]

Qwest violates each of these requirements in each of the five joint-application states. In all five states, Qwest imposes unreasonable and non-cost-based "entrance facility" charges on CLECs that wish to interconnect at a Qwest tandem or end office switch and thus drives up the cost of interconnection. Also in all five states, Qwest imposes substantial and discriminatory financial penalties on CLECs that fail to meet Qwest's arbitrary 50 percent trunk utilization requirement – a requirement Qwest itself does not meet and for which Qwest suffers no comparable consequences. In all states but Colorado, Qwest further restricts efficient interconnection by barring CLECs from placing interconnection traffic on existing trunk groups that carry interLATA toll traffic. And in all states, Qwest bars CLECs from placing interconnection traffic on private lines and arbitrarily limits the length of interconnection trunks to 50 miles. Each of these restrictions has the anticompetitive effects of deterring and delaying

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[226] Section 251(c)(2) imposes a duty on ILECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A). The Commission has concluded that "interconnection" in section 252(c)(2) refers "only to the physical linking of two networks for the mutual exchange of traffic,… and not the transport and termination of traffic." *Local Competition First Report and Order* ¶ 176.

[227] 47 U.S.C. § 251(c)(2)(B). *See also* 47 C.F.R. § 51.305 (requiring interconnection "[a]t any technically feasible point"). In its *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order* ¶¶ 26, 210, 47 C.F.R. § 51.305(a)(2).

[228] 47 U.S.C. § 251(c)(2)(C).

facilities-based entry by driving up the cost of using facilities to interconnect with Qwest's network.

1. Qwest's "Entrance Facility" Charge Denies CLECs Reasonable Access To CLEC-Selected Points Of Interconnection ("POI").

Qwest's SGATs in all five states impose unlawful "entrance facility" charges on CLECs obtaining interconnection trunks from Qwest. There is no sound economic or engineering reason why Qwest should levy an "entrance facility" charge, which is essentially a loop charge, for these interconnection trunks, and such charges are therefore anticompetitive and inconsistent with the Commission's rules.[230]

When a CLEC wishes to establish interconnection between its switch and a Qwest switch, Qwest's SGATs deem *any* Qwest-provided transport between the CLEC switch (or other POI) and the nearest Qwest wire center (called the "serving wire center" or SWC) to be an "entrance facility." Whenever a CLEC wishes to establish a connection from its own switch to a Qwest switch using interconnection trunking provided by Qwest, Qwest requires the CLEC to purchase an "entrance facility" from the CLEC switch to the nearest Qwest serving wire center.[231] These "entrance facilities" are considered to be "high speed digital loops" and are priced as such – *i.e.*, the charges for entrance facilities are flat-rated and *non*-distance-sensitive. If the CLEC wishes to establish interconnection with a Qwest switch other than the nearest Qwest switch, Qwest forces the CLEC to purchase both the entrance facility (to the Qwest SWC) and what it calls "direct trunked transport" between Qwest switches (*i.e.*, from the serving wire

[229] *Id.* § 251(c)(2)(D).

[230] *See* 47 U.S.C. §§ 251(c)(2), 252(d)(2); 47 C.F.R. § 51.705.

[231] *See* SGAT § 7.1.2.1.

center to the CLEC's desired Qwest switch). Direct Trunked Transport is a flat-rated, distance-sensitive charge.[232]

Qwest's "entrance facility" charges are unlawful because they do not reflect the way these costs are incurred. There is no economic or engineering difference whatsoever between the "entrance facility" – the transport link between the CLEC's switch and the SWC – and the "direct trunked transport" – the second link between Qwest's wire centers. Accordingly, there is no justification for creating separate "entrance facility" and "direct trunked transport" charges. Qwest has improperly borrowed the "entrance facility" concept from the context of access charges; in that context, entrance facilities are priced like loops and were originally designed to function as subsidy elements.[233]

The principal effect of these "entrance facility" charges is dramatically to raise the price of interconnection, because the CLEC switch is often in close proximity to the Qwest "SWC." The CLEC should be able to obtain "Direct Trunked Transport," without need for any entrance facilities or other costs, continuously from the CLEC switch to the Qwest switch, whether a tandem or directly to an end office. Wilson Dec. ¶ 11. The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection, in violation of sections 251(c)(2) and 252(d)(2).[234]

The Colorado Hearing Examiner's resolution of this issue was in error. As the Hearing Examiner saw it, the issue was "whether Qwest must extend its network to accommodate a

[232] *See* Wilson Dec. ¶¶ 8-9; Freeberg Interconnection Dec. at ¶ 18 n.10.

[233] Wilson Dec. ¶ 10.

[234] Although the SGATs state that CLECs may request other technically feasible means of interconnection, which Qwest will consider through the Bona Fide Request process (*see* SGAT § 7.1.1), this provision has nothing to do with Qwest's classification of facilities between the CLEC switch and the Qwest SWC as "entrance facilities," which Qwest insists on pricing as if the CLEC had ordered a loop. In other words, although CLECs may request other technically feasible physical arrangements for interconnection, it would still be the case that any Qwest-provided trunking between the CLEC switch and the nearest Qwest switch would be deemed an "entrance facility." Wilson Dec. ¶ 12.

CLEC's requested point of interconnection."[235] In fact, the issue has nothing to do with whether Qwest must "extend its network" anywhere; the issue is the pricing of these trunks, and whether Qwest is entitled to tack a gratuitous loop charge on top of its distance-sensitive transport rates. Sections 251(c)(2) and 252(d)(2) preclude such a rate structure, and therefore Qwest has failed to satisfy this checklist item.

2. Qwest's Interconnection Arrangements Discriminate Against CLECs And Provide CLECs With Interconnection Arrangements Inferior To Those Qwest Provides For Its Own Connections.

Qwest's trunk forecasting requirements are discriminatory and unreasonable in violation of Qwest's interconnection obligations. First, if a CLEC forecasts a need for more trunks than Qwest *thinks* the CLEC will need, Qwest forces the CLEC to pay a construction deposit, which will not be returned if the CLEC's utilization falls below a certain threshold. To make matters worse, Qwest reserves the unilateral right to "snatch back" trunks if the CLEC's utilization of a trunk falls below 50 percent, and thus forces CLECs to incur the substantial non-recurring costs of reordering new trunks if the CLEC's traffic subsequently increases. These provisions are anticompetitive, unreasonable, and discriminatory.

Under Qwest's SGATs (§ 7.2.2.8.6), both the CLEC and Qwest forecast the trunking that will be necessary for interconnection between those two carriers in each coming quarter. Qwest's forecasts are invariably lower than the CLEC's. If the CLEC's utilization has been below 50% in the previous 18 months, and the CLEC's forecasts are higher, the CLEC must pay Qwest a deposit in order to obtain the full amount of trunking that it thinks it will need. If the CLEC's utilization does not reach 50 percent of the CLEC's forecast within 6 months, however, the CLEC loses its deposit (in whole or in part). *See* SGAT § 7.2.2.8.6.1.

[235] *Colorado Interconnection Order* at 27.

These provisions are unreasonable and discriminatory. The Commission has noted that "the requirement to provide interconnection on terms and conditions that are 'just, reasonable, and nondiscriminatory' means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations."[236] Under section 251(c)(2)(C), the interconnection arrangements provided to CLECs must also be "equal in quality" to the connections an ILEC provides for itself, meaning that an ILEC must provide connections between its network and that of a requesting carrier "that is at least indistinguishable from that which the incumbent provides itself."[237] The Commission expressly included the probability of trunk blocking when defining this standard.[238]

The forecasts at issue in SGAT § 7.2.2.8.6 are made by both Qwest and the CLEC because each company is trying to predict what trunk capacity is needed so that no call blocking will occur.[239] Qwest argues that it has the right to impose the deposit requirement "to give CLECs an incentive to provide accurate forecasts,"[240] ignoring the fact that CLECs have no incentive to install, maintain and pay for a vast number of underutilized trunks to Qwest end offices, given that such policies cost the CLEC just as much in switch terminations as they do Qwest. Moreover, Qwest's requirement puts a CLEC in the position of choosing between risking a Qwest-imposed financial penalty if it over-estimates its trunk utilization or risking

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[236] *NJ 271 Order*, App. C., ¶ 19; *see also Local Competition Order* ¶ 218.

[237] *Local Competition Order* ¶ 224.

[238] "Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality." *NJ 271 Order*, App. C., ¶ 18 n.635.

[239] *See* Wilson Decl. ¶ 15.

[240] Freeberg Interconnection Decl., ¶ 118.

customer-affecting blockage if it under-estimates utilization. Both options risk competitive impacts, and Qwest cannot be allowed to impose that choice on CLECs.[241]

Qwest, of course, faces no such choice. Indeed, Qwest's own trunk utilization in recent months has been consistently *below* 50 percent.[242] In violation of the requirement that CLECs be given parity treatment by an ILEC, Qwest does not hold itself to the 50 percent utilization standard it imposes on CLECs.

Compounding the inherent inequity of Qwest's insistence that a CLEC maintain a trunk utilization efficiency greater than Qwest itself can manage is the fact that it is generally more difficult for CLECs, with their much smaller networks, to achieve utilization levels equal to or greater than those of an entrenched incumbent.[243] CLECs generally have smaller amounts of traffic than an ILEC, and that traffic is subject to more and greater variability, because the CLECs' customer bases change more rapidly than Qwest's.[244] Thus, from an engineering management perspective, it is unreasonable to expect CLECs to achieve utilization levels higher than those of Qwest.[245]

The practical effect of these provisions is that CLECs scale back their facilities-based market entry to prevent excess blocking. When interconnection trunks are maintained at utilization levels that are high, there is the risk of excessive call blocking, to and from the Qwest network. If too many customers, or even one large customer, is put on the CLEC network without considering the trunking that is needed to carry the calls, excessive blocking will result in the interconnection trunks. AT&T will literally delay putting customers on their network, and

[241] *See* Wilson Dec. ¶ 20.
[242] *See* Wilson Decl. ¶ 16.
[243] *See* Wilson Decl. ¶ 17.
[244] Id.
[245] *Id.*

will carefully manage when it adds traffic to the network, to prevent blocking that can be caused by Qwest's unreasonable and costly limitations. Qwest's construction deposit provisions are therefore unnecessary and blatantly anticompetitive.[246]

In a further derogation of its interconnection obligations, Qwest's SGATs provide that Qwest may unilaterally determine that a CLEC is underutilizing its trunks and snatch trunks back from the CLEC regardless of the CLEC's needs or plans for the trunks it holds and for which it pays.[247] Of course, CLECs have no economic incentive to install, maintain and pay for any significant number of underutilized trunks, and CLECs are obviously in the best position to project their future needs for interconnection trunks. Only the CLEC should determine if it is appropriate to return underutilized trunks to Qwest. There is no reason why Qwest should have the authority unilaterally to determine whether a competitor may retain the trunks it is using.[248] This policy effectively forces the CLEC to re-order the trunks later, and pay Qwest's sizeable nonrecurring costs a second time.

In short, Qwest's SGATs make Qwest the overseer of a CLEC's trunk-utilization, with the right (1) to determine unilaterally that the CLEC is not using its trunks according to utilization demands that Qwest does not meet itself and (2) to take back the trunks that Qwest wants, regardless of a CLEC's own projections and plans. This gives Qwest unprecedented and unreasonable power to disrupt its competitors' entry plans and conduct of their business. Such discriminatory treatment cannot be permissible under the interconnection requirements of the Act.

[246] Wilson Dec. ¶ 20.

[247] *See* Wilson Decl. ¶ 22; *see also* SGAT § 7.2.2.8.13.

[248] Qwest's snatch back policy is also unreasonable in that it is much easier and more efficient for Qwest to internally manage and resize Qwest network trunks than it is to snatch back trunks from CLECs and then force a CLEC to re-acquire the trunks to accommodate its growth. *See* Wilson Decl. ¶ 24.

3. Qwest Unlawfully Requires CLECs To Place Interconnection Traffic On Separate Trunk Groups.

Qwest's SGATs in Iowa, Idaho, Nebraska, and North Dakota (§ 7.2.2.9.3.2) prohibit CLECs from placing interconnection traffic on the trunk groups they have already established to carry toll traffic. And all of Qwest's SGATs (§ 7.3.1.1.2) effectively prevent CLECs from placing interconnection traffic on spare private line facilities, by charging CLECs private line rates for all trunks associated with a given facility, even if some trunks are available to carry interconnection traffic. These restrictions prevent CLECs from efficiently using their existing, spare trunk capacity for interconnection, and further drive up the costs of interconnection with Qwest.

Interexchange carriers such as AT&T have existing switched access trunk groups to Qwest switches that carry interstate long distance traffic. It would be efficient for AT&T to use these same trunk groups to carry local traffic as well. Instead, Qwest demands that CLECs use one set of trunk groups for interLATA calls and another set of trunk groups for local and intraLATA calls. This requirement increases the number of trunks, increases the cost of interconnection, and squanders available trunk resources. Indeed, it requires CLECs to establish two parallel trunks groups, each of which is operated at sub-optimal utilization, when one trunk group would suffice. And it makes it all the more difficult for CLECs to comply with Qwest's artificial utilization requirements.

There are no legitimate grounds for Qwest's separate trunk requirement. It is technically feasible to place interconnection traffic on interLATA trunk groups. AT&T has done so for years in those states (such as Arizona and Washington) that have refused to let Qwest put up this barrier. In those states, AT&T provides Qwest with a Percent Local Usage ("PLU") factor to permit appropriate billing. And Qwest remains free to track CLEC usage through its switch records and bill the CLEC accordingly. For these reasons, Colorado has now required Qwest to permit AT&T to place interconnection traffic on its interLATA trunks. In the remaining four joint-application states, however, the restriction persists.[249]

There is also no good reason for Qwest to prevent CLECs from using spare private line facilities for interconnection. CLECs buy special access or private line facilities from Qwest to reach end user customers. These same facilities can efficiently carry interconnection traffic, and proportional pricing can be used to appropriately charge the CLEC for the two types of traffic. Indeed, that is precisely what the Washington PUC has now required Qwest to provide. By charging CLECs private line rates for the complete facility, including those spare trunks that are available for interconnection traffic and could otherwise be billed under the reciprocal compensation requirements, Qwest again effectively forces CLECs to build separate trunk groups for interconnection.

By forcing CLECs to build separate trunk groups to carry interconnection traffic, Qwest forces CLECs to overbuild their networks at a time when CLECs can least afford to do so, thereby substantially raising the cost of entry and deterring facilities-based competition. Qwest's unlawful, and discriminatory conduct is particularly anticompetitive because Qwest faces no such restrictions today or in the future. Qwest will not build duplicate networks for local traffic as opposed to private line or interLATA use. It should not be permitted to deter competition by foisting such a costly and wasteful network-design requirement upon its competitors.[250]

4. Qwest's Length Limitation On Interconnection Trunks Is Unlawful.

Qwest's SGATs also arbitrarily limit the length of interconnection trunks between Qwest switches to 50 miles. In other words, when a CLEC wishes to purchase interconnection trunks

[249] *See* Wilson Decl. ¶ 28.

[250] *See* Wilson Dec. ¶¶ 29-32.

that would involve transport of more than 50 miles between Qwest switches, and Qwest lacks adequate capacity on such a route, Qwest requires the CLEC to build the additional capacity for Qwest. There is no legitimate justification for this anticompetitive, cost-raising requirement.

It is Qwest's obligation to "provide ... interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access."[251] Thus, when a CLEC has chosen its own switch as its point of interconnection with Qwest, it is Qwest's responsibility to deliver the traffic to the chosen destination once that traffic has been handed off to Qwest. If Qwest must use trunking within its network that is more than 50 miles, and that trunking is at capacity, it is *Qwest's* responsibility to perform the necessary upgrades in order to fulfill its obligations, not the CLEC's.[252] Indeed, by substantially raising the cost to the CLEC of choosing its own switch as the POI, Qwest has materially diminished the CLEC's ability to choose its own POI, and at the margin Qwest effectively forces the CLEC to build to a meet-point rather than incur the penalties associated with Qwest's 50-mile limitation. *See* 47 U.S.C. § 251(c)(2) (CLEC has the right to choose point of interconnection at any technically feasible point). Qwest's 50-mile limitation is blatantly discriminatory and anticompetitive, and violates Section 251(c)(2). *See* Wilson Dec. ¶¶ 33-36.

B. Qwest Denies CLECs Nondiscriminatory Access To Unbundled Network Elements.

Qwest discriminates against CLECs in the provisioning of unbundled network elements, in addition to OSS, in a number of ways that all violate its core checklist obligations. These include discrimination in (1) building new facilities to serve customers; (2) access to the network

[251] 47 U.S.C. § 251(c)(2)(A).

[252] Qwest's 50-mile limitation applies only to trunking *within* Qwest's network – *i.e.*, between Qwest switches – and *not* to trunking that connects a CLEC switch to the nearest Qwest switch (which Qwest calls an "entrance facility").

elements of Qwest's affiliates; (3) combining UNEs with telecommunications services; and (4) responding to mistakenly directed requests for maintenance and repair.

1. Qwest Discriminates Against CLECs That Place UNE Orders Requiring Construction of New Facilities.

Qwest has yet to fully implement its obligation to provide CLECs nondiscriminatory access to unbundled network elements in circumstances when a CLEC's UNE order requires construction of new facilities. It fails to meet its obligations in two respects.

First, in all states except Colorado, Qwest may refuse to build the new facilities necessary to provision a CLEC's UNE order in circumstances when Qwest would build such facilities to provision its own customer's order. As the Colorado Commission correctly held, that policy is flatly discriminatory. Second, in all five states, Qwest is allowed to cancel a CLEC's UNE order (either immediately or, in Colorado and Iowa, after 30 days) if Qwest concludes that capacity is not available, instead of holding the order indefinitely until capacity is available, as Qwest does for its own retail customers. This discriminatory policy allows a customer selecting Qwest for service that requires new capacity to keep its place in Qwest's "queue" for new facilities, while a customer who selects a CLEC finds its order cancelled and loses the priority it would otherwise have had for obtaining service had Qwest simply held the CLEC's order.

a. In Idaho, Iowa, Nebraska, and North Dakota, if a CLEC orders an unbundled loop and the facilities are not currently available, Qwest's SGATs provide that Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service." SGAT § 9.1.2.1. As the SGAT states, "[i]n other situations, Qwest does not agree that it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to Section

9.19 of this Agreement." *Id.* And under Section 9.19, Qwest applies the following standard: "Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs." SGAT § 9.19.

As the Colorado Commission correctly recognized, these provisions are discriminatory. They permit Qwest to refuse to build a facility for a CLEC when Qwest would build that same facility for itself so that Qwest could provide the same service to the same retail customer that the CLEC intends to serve.[253]

For example, under the non-Colorado SGATs, Qwest is the only LEC that can effectively compete for customers needing new loops (because it can refuse to build loops for anyone but itself). When building new loops for CLECs, Qwest would rarely, if ever, be required physically to install new fiber in new conduit laid in newly acquired rights of way between an end office and the customer premises. Rather, Qwest would almost always be able to take advantage of its existing, ratepayer-financed infrastructure – *i.e.*, poles, conduits, rights of way, and copper or fiber conductors – that Qwest has already deployed and is using today, and could quickly and cheaply augment those facilities by, for example, adding newer electronics on optical fiber to increase capacity for additional loops and transport on existing fiber. A CLEC, by contrast, would virtually always incur the far greater, and usually prohibitive, costs of building a new loop from scratch, including obtaining rights of way, and installing conduit and new fiber.[254] Thus, by refusing to build facilities needed to fulfill a CLEC's UNE order, Qwest ensures that only Qwest is in a position economically to provide service for customers needing new facilities.

[253] Wilson Decl. ¶ 40.

[254] Wilson Decl. ¶ 41.

The Colorado Commission therefore correctly required Qwest to add language to its Colorado SGAT that requires it to build whenever it would build for itself.[255] Qwest's invocation of its POLR and ETC obligations is obviously inapposite, because those obligations are limited to DS0 loops. By providing Qwest standardless discretion to refuse to build for CLECs in circumstances when Qwest would build for itself, the four non-Colorado SGATs fail to meet the requirements of Section 251(c).

b. All five states permit Qwest to discriminate against CLEC UNE orders in one additional, important respect with respect to the building of new facilities. In Colorado and Iowa, the SGATs permit Qwest, when it does not have capacity to fill a UNE order, to hold a CLEC order for 30 days (to see whether facilities become available), and then, if capacity remains unavailable, to cancel the order.[256] At that point, the CLEC must "submit a request to build UNEs pursuant to Section 9.19 of this Agreement." In Idaho, Nebraska, and North Dakota, Qwest rejects the order immediately.[257]

Each of these SGATs is discriminatory, because none requires Qwest to treat the CLEC's order as Qwest would treat a comparable order from one of its own retail customers. Qwest holds its customers' orders indefinitely until Qwest has built the facilities to provision the requested service. That policy ensures that a Qwest customer's priority for receiving service contingent on new facilities is measured from the time of its original order for service; a CLEC customer, by contrast, loses its place in the "queue" when Qwest cancels the CLEC's order and requires submission of a new order.[258] The discrimination is compounded by the superior

[255] *See* Colorado SGAT § 9.19 ("Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself"); Simpson/Stewart Access Dec. ¶¶ 23-24.

[256] SGAT §§ 9.1.2.1.3.2; 9.2.2.16.

[257] Wilson Decl. ¶ 42.

[258] Wilson Decl. ¶ 44.

knowledge and limited disclosure obligations that Qwest enjoys with respect to the constraints on existing capacity and the planning of new construction, which ensures that Qwest will always be better able than CLECs to alert prospective customers as to the implications of new-facilities construction for providing the service they request.[259] Qwest should therefore be required to treat CLEC UNE orders no differently than orders from Qwest retail customers when those orders will require construction of new facilities.

2. Qwest Denies CLECs Unbundled Access To The Network Elements Of Qwest Affiliates.

Qwest also fails to provide nondiscriminatory access to unbundled network elements in Idaho, Iowa, Nebraska, and North Dakota, because it does not permit CLECs to obtain nondiscriminatory unbundled access to the network elements – and, in particular, the local transport and dark fiber – of Qwest Corp.'s affiliates pursuant to sections 251 and 252 of the Act.[260] As Colorado has correctly recognized, those affiliates are subject to the Act's unbundling requirements. Qwest's refusal to give competitors access comparable to what Qwest enjoys is therefore discriminatory and unlawful.

Section 251(h) defines an incumbent LEC as a LEC that provided local exchange service in an area at the time of enactment of the 1996 Act and was deemed to be a member of NECA, or "a person or entity that, on or after such date of enactment, became a successor or assign" of such a LEC. Qwest Communications International ("QCI") is a holding company formed by the merger between Qwest and U S WEST, which has two relevant subsidiaries: Qwest Corporation ("QC"), the successor to the pre-merger U S WEST local exchange operations, and Qwest Communications Corporation ("QCC"), the successor to the pre-merger Qwest's operations. QC is indisputably an ILEC for purposes of Section 251(h). QCC, however, has deployed its own

[259] *Id.*

fiber transport facilities that can be used in the provision of local exchange service, and QC and QCC are now part of a merged firm that is integrating its operations. To the extent that QC is using or has access rights to QCC's transport facilities, QCC is a "successor or assign" of QC under Section 251(h) and thus would be subject to the Act's unbundling requirements as an ILEC.

This is clear from both the case law and the Commission's precedents. For example, when the Commission approved the Qwest/U S WEST merger, the Commission determined that the Qwest affiliates would be deemed "successors and assigns" under section 251(h) of the Act if Qwest attempted to transfer local exchange operations to the affiliate.[261] In that proceeding, McLeodUSA argued that the Commission should reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LEC's traditional local services are degraded and serve only residential users and other [competitive] LECs."[262] McLeod USA further argued that, after the merger, U S WEST will be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the [incumbent] LEC obligations under section 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The Commission rejected McLeod's argument, and expressly stated that "[s]uch an affiliate of U S WEST would be considered a 'successor or assign' of U S WEST for the purposes of the obligations imposed by section

[260] *See* SGAT § 9.7.2.20.

[261] Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 99-272, 15 FCC Rcd. 5376, ¶ 45 (2000).

[262] *Id.* at n.131.

251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under section 251(c)(4)."[263]

Similarly, the D.C. Circuit held that SBC and Ameritech could not avoid their Section 251(c) obligations with respect to advanced services merely by shifting those operations to an affiliate.[264] In finding the affiliate to be a "successor or assign," the court specifically noted that the "affiliate markets the same category of services to the same body of potential customers as did the [ILEC]." Moreover, the court found that the fact that the ILEC had not transferred "its monopoly assets" to the affiliate was irrelevant. Given that the affiliate was providing certain local exchange services (*i.e.*, local advanced services), the court held that the Commission could not shield those operations from the requirement of Section 251(c) through "the technique of defining successor and assign to exclude the transfer" of those operations.[265] Indeed, the court held that allowing an ILEC to "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme."[266]

Qwest's attempts to shield the local facilities owned by its QCC affiliate from Section 251(c) are equally unlawful. As the Colorado Staff concluded, "[a]s it is occurring today, and as it continues into the future, the merged entities' facilities are becoming operationally integrated, and it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local

[263] *Id.* at ¶ 45 (footnotes omitted).

[264] *See ASCENT* v. *FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[265] *ASCENT*, 235 F.3d at 666-67.

[266] Indeed, the court dismissed such reasoning as improper "legal jujitsu." *Id.* at 667 ("[T]he Commission is using language designed by Congress as an added limitation on an ILEC's ability to offer telecommunications services as a statutory device to *ameliorate* § 251(c)'s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent § 251(c)'s obligations merely by setting up an affiliate

exchange services."[267] As a result, the staff recommended and the Hearing Officer agreed that Qwest should amend its SGAT in Colorado to offer unbundled access to any QCC dark fiber to which QC has access rights.[268] Qwest has yet to comply with the Act, however, in Idaho, Iowa, Nebraska, and North Dakota. For that reason as well, the Application should be denied.

3. Qwest's Refusal To Connect UNEs And Finished Services Is Discriminatory.

Qwest's Colorado SGAT is also blatantly discriminatory in that Qwest refuses to connect UNE combinations to certain "Finished Services," including "voice messaging, DSL, Access Services, Private Lines, resold services, and other services that this Commission or the FCC expressly prohibit to be connected to UNE combinations."[269] A CLEC can connect UNE combinations to such services only by making the connection itself in its collocation space. As at least one state commission has found, these provisions are discriminatory and deny CLECs the right to access UNEs at any technically feasible point.

The Commission permits an ILEC to refuse to connect UNE combinations and finished services in only one instance – an ILEC may refuse to connect "EELs" (enhanced extended links, or combinations of loop and transport) with special access services.[270] This is generally known as the ban on "commingling" – *i.e.*, a CLEC may not "commingle" EEL traffic and special access traffic on the same facilities. In that instance (and that instance alone), the ILEC can in effect force the CLEC to build two parallel networks in the same central office, one for UNE

to offer telecommunications services. The Commission is thus using the successor and assign *limitation* as a form of legal jujitsu to justify its *relaxation* of § 251's restrictions").

[267] Colorado Staff Report on Emerging Services at 9 (Jan. 10, 2002).

[268] *See* SGAT § 9.7.2.20 ("Qwest shall allow CLEC access Dark Fiber owned directly by Qwest, or to which Qwest has a right of access resulting from agreement with a third party, whether or not affiliated with Qwest. CLEC shall have access to such fiber to the same extent that Qwest has access to such fiber").

[269] Colorado SGAT § 9.23.1.2.2.

[270] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, ¶ 22 (rel. June 2, 2000) ("Supplemental Order Clarification").

traffic, and another for special access traffic. Such a arrangement would be so costly and inefficient that the ban on commingling effectively functions as a ban on the use of EELs altogether.

The Commission has never indicated, however, that ILECs could lawfully institute bans on other forms of "commingling" (*i.e.*, the connection of UNEs with other "finished" services). The ban on commingling that the Commission adopted in the *Supplemental Order Clarification* is a special, interim rule designed to address a unique situation (the possible migration of traffic from special access to UNEs). Qwest's newly minted bans on other forms of commingling would force CLECs to create the same sort of grossly inefficient network configuration – duplicative networks in the same central office for different services – that the Commission's debilitating ban on EEL/special access commingling requires. Such a policy would be blatantly discriminatory, because Qwest is not required to establish such duplicative and inefficient arrangements for the provision of the same services. An incumbent LEC is not permitted to impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.[271]

Moreover, section 251(c)(3) of the Act also allows access to UNEs at any technically feasible point,[272] using any technically feasible method.[273] The Commission has said that "the use of the term 'feasible' implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a

[271] 47 C.F. R. § 51.309(a).

[272] *See also* 47 C.F.R. § 51.307(a).

[273] *Id.*, § 51.321(a).

novel use of, or some modification to, incumbent LEC equipment."[274] Qwest has never provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible.[275] In fact, the SGATs implicitly concede that connecting finished services to UNEs is technically feasible by requiring such connection be done in a CLEC's collocation.[276] By restricting any combination of UNEs and tariffed services to combinations that a CLEC provisions itself in collocation space, Qwest is requiring CLECs to construct separate networks – one using private line/special access circuits and the other using UNEs – rather than permitting CLECs to use facilities from Qwest, or from multiple sources, to serve their customers most efficiently. Such a restriction not only is unnecessarily inefficient and expensive but it allows Qwest to control CLECs' market entry by delaying the provisioning of facilities or limiting the utility and availability of UNEs.

Other state commissions have rejected this restriction.[277] Qwest's SGATs in Idaho, Iowa, Nebraska, and North Dakota state that Qwest refuses to connect UNE combinations to "Finished Services" only where federal or state law specifically prohibits such connections.[278] In those states, therefore, there is some uncertainty whether the state will adopt Qwest's overbroad interpretation of the "commingling" exception. In Colorado, however, Qwest's SGAT, on its face, violates Qwest's obligation under section 271(c)(2)(B)(ii) to provide nondiscriminatory access to unbundled network elements.

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[274] Local Competition Order, ¶ 202.

[275] The ILEC has the burden to prove that a method of accessing UNEs is not technically feasible. *See* 47 C.F.R. § 51.321(d).

[276] SGAT § 9.23.1.2.2; *see also id.*, § 9.6.2.1.

[277] *E.g.*, *In re Investigation Into [Qwest's] Compliance With Section 271*, Washington Utils. & Transp. Comm'n Docket Nos. UT-003022 & UT-003040, Twenty-fourth Supp. Order at 10 (Dec. 20, 2001).

[278] *See* SGAT § 9.23.1.2.2 (ID, IA, NE, and ND) ("Where specifically prohibited by applicable federal or state requirements, UNE Combinations will not be directly connected to a Qwest Finished Service, whether found in a Tariff or otherwise, without going through a Collocation, unless otherwise agreed to by the Parties").

4. Qwest Provides Discriminatory Access To Unbundled Network Elements By Exploiting CLEC Customer Service Calls As Winback Opportunities.

Qwest denies CLECs nondiscriminatory access to network elements by converting its customer support for maintenance and repair into an engine for winning back CLEC customers. Specifically, in Colorado, Qwest's SGAT and ICA §§ 6.4.1 and 6.6.3[279] set forth Qwest's policies for dealing with CLEC customers that, in error, call Qwest with questions about service or maintenance and repair. Under the terms of its Colorado SGAT, Qwest is permitted to turn these misdirected calls into solicitation opportunities for itself. Those conditions are unreasonable because Qwest should not be permitted to abuse its unique position as the dominant local carrier by allowing it to capitalize upon misdirected calls from CLEC customers. These conditions are also discriminatory because, even though CLECs would theoretically be permitted to engage in the same conduct, real-world experience dictates that Qwest, as the dominant provider, will benefit almost exclusively from this winback practice.

In the proceedings below, AT&T proposed language that would prevent precisely that conduct by requiring carriers to direct such callers to the proper carrier, while nevertheless not prohibiting Qwest "from discussing its products and services with CLEC's or Qwest's end users who call the other Party seeking such information."[280] This proposal was a narrowly drawn restriction that safeguards the very important legislative goal of encouraging the growth of competition in the local telecommunications market. Indeed, Qwest admits that in the proceedings below, acting at the Multistate Facilitator's direction, it adopted the words "'seeking

[279] Depending of the version of the SGAT, § 12.3.8 as referenced in section § 6.6.3 may prove to create problems similar to those found in § 6.4.1.

[280] Wilson Decl. ¶ 77.

such information' at the end of [Section 6.4.1] . . . to the SGATs in Idaho, Iowa and Nebraska."[281]

Qwest, however, refused to adopt similar language in Colorado.[282] Qwest justified this unreasonable and discriminatory condition on providing resale products and services by arguing that the First Amendment guarantees Qwest the ability to turn misdirected incoming calls into marketing opportunities for its services.[283] As Qwest recognizes, its argument was rejected by the MultiState Facilitator, who concluded that "if a customer mistakenly calls Qwest or a CLEC, the end user customer should be instructed to contact the CLEC or Qwest, as appropriate, and Qwest's or the CLEC's representative should not be allowed to market their services to the end user unless the end user requests information about Qwest's or the CLEC's products and services."[284] However, a Colorado Hearing Commissioner agreed with Qwest, and ruled that the requested restriction would be an impermissible restriction on speech.[285]

That conclusion cannot be squared with a long line of decisions upholding similar reasonable limitations on BOC marketing efforts in the face of the same First Amendment challenges. The Supreme Court has repeatedly held that commercial speech, as here, enjoys only limited First Amendment protection. First, for commercial speech to be afforded any First Amendment protections, it must concern lawful activity and not be misleading.[286] And even if protected, commercial speech is properly subject to governmental regulation where, as here, the

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[281] Declaration of Lori A. Simpson, at 12-13, ¶ 17.

[282] Simpson Decl. at 13, ¶ 18.

[283] Declaration of Lori A. Simpson, at 13, ¶ 18.

[284] *Id.* at 12, ¶ 17.

[285] *Investigation Into US WEST Communication's, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996,* Colorado PUC Docket No. 97I-198T, Resolution of Volume II.A Impasse Issues, Decision No. RO1-848 (August 17, 2001).

[286] *Lorillard Tobacco Co.* v. *Reilly,* 121 S.Ct. 2404, 2421 (2001); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 563-64 (1980).

government has a substantial interest in support of its regulation and the restriction is narrowly tailored to materially advance that interest.[287]

As the Commission has previously found, "it cannot reasonably be denied that Congress's interest in managing an orderly transition to competition in the local telephone markets is an important one," and the goal of promoting competition in these markets is of substantial government interest.[288] Moreover, the modest limitation requested here – that Qwest not use mistaken inbound calls as an opportunity to market its services – is both narrow and tailored to further these substantial interests. The requested restriction has no impact whatsoever on any of the mass-marketing that Qwest routinely does and remains free to do; rather, it narrowly applies only those instances when Qwest's customer-service and operations-support personnel mistakenly receive an inbound call from a CLEC customer seeking only assistance with a problem related to CLEC service. Rather than soliciting those callers by telling them (or implying) that they would not have service problems if they switched their service back to Qwest, Qwest should simply refer those callers to the CLEC. The restriction also is tailored to reach the substantial federal interests, because it is focused on preventing Qwest from taking unfair advantage of its dominant position in the local exchange market by turning mistaken inbound calls into marketing opportunities for itself.

Indeed, the requested restriction is much more modest than the equal access requirements that BOCs have been operating under for years, and which were continued by Congress in

[287] *See Lorillard,* 121 S.Ct. at 2421; *see also* CPNI Order, ¶ 43 ("Government restrictions on commercial speech will be upheld where, as here, the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn.").

[288] *In re AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, Memorandum Opinion and Order (rel. Jun. 30, 1998); CPNI Order, ¶ 107.

section 251(g).[289] A core requirement of equal access is – and has long been – that when a BOC receives an incoming customer call for new service or a PIC change, the BOC representative must advise the customer of his or her options for long distance service in a neutral manner, and offer to read callers a random list of available interexchange carriers.[290] The goal of the equal access requirements, like the goal of the restriction requested here for mistaken inbound calls, is to limit a BOC's ability to take unfair advantage of its dominant market position, arising from its longstanding monopoly of local phone service. For competition to be fair, Qwest cannot be allowed to leverage its monopoly-based receipt of mistaken inbound calls to steer a competitor's customer back to Qwest. The First Amendment thus does not bar the requested limited and reasonable restriction on Qwest's marketing plans.

C. Qwest Fails To Comply With Its Obligation To Provide Unbundled Switching.

Section 271(c)(2)(B)(vi) of the competitive checklist requires a BOC to provide '[l]ocal switching unbundled from transport, local transmission, or other services."[291] Qwest fails in two ways to satisfy the requirement to provide unbundled local switching. First, Qwest refuses to provide switching or UNE-P when the end user has 3 or more lines in a wire center (instead of, as the Commission rules allow, three or more lines in a single *location*). Second, Qwest discriminates against CLECs by providing them with low quality packet switching.

[289] Similarly, the Commission has rejected First Amendment challenges to its restrictions on certain BOC marketing efforts using CPNI, *CPNI Order*, ¶¶ 43, 106, and has barred BOCs from using CPNI in marketing to retain "soon-to-be-former customers," *CPNI Reconsideration Order* ¶ 74. Notably, in restricting BOC use of CPNI in certain BOC marketing, the Commission recognized that "[c]arriers already in possession of CPNI could leverage their control of CPNI in one market to perpetuate their dominance as they enter other service markets. *CPNI Order* ¶ 37.

[290] *See, e.g., United States v. Western Electric Co., Inc.*, 578 F. Supp. 668, 677 (D.D.C. 1983); *BellSouth South Carolina Order* ¶ 239.

[291] 47 U.S.C. § 271(c)(2(B)(vi).

1. Qwest Improperly Exploits The Commission's Narrow Switching Carve Out Exception To Avoid Full Compliance With Its Obligation to Provide Switching As An Unbundled Network Element.

Qwest is obligated to make unbundled local switching available to competitive LECs. The Commission established a narrow "exception" to this obligation, such that ILECs who provide nondiscriminatory, cost-based access to enhanced extended links ("EEL") are not required to provide access to unbundled switching in the most dense urban zones in the top 50 metropolitan statistical areas ("MSAs") to a CLEC where the end user has four or more lines.[292]

Qwest's Colorado SGAT provides that "[t]his exclusion will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an End User Customer within a Wire Center."[293] Under this provision, Qwest will count the total number of lines an individual customer has in a wire center to determine whether this exception applies.[294] This practice violates Qwest's obligation to provide unbundled switching, because counting lines on a "per-wire-center" basis rather than on a per-location basis unreasonably extends the Commission's narrow exception.

The Commission established the narrow exception after concluding that 3 lines or less "captures a significant portion of the mass market" of residential and small business customers. *UNE Remand Order* ¶ 293-94. Qwest's definition, however, excludes many small business locations CLECs can and should be able to serve via UNE-P. A business with two lines in two locations, or a husband and wife each with small businesses but using the same billing address for phone service, or a customer with three lines at a business location and another business line at home—each of these small business customers would fall within the Commission's definition

[292] *Id.* ¶¶ 253 & 278.

[293] SGAT §§ 9.11.2.5.2, *see also id.* § 9.11.2.5.1. In this five-state application, this issue is applicable only to Colorado, because Denver is the only MSA in these states in which the switching carve out exception applies.

[294] *See* Simpson/Stewart Switching Decl. ¶ 21.

of a mass market customer, but each might be excluded from receiving unbundled switching at UNE rates under Qwest's per-wire-center approach to counting lines.

Qwest's per-wire-center basis for counting lines was accepted by the state commissions based on a misreading of the Commission's *UNE Remand Order*. The Multistate Facilitator purported to resolve the issue by "giving meaning to the phrase chosen by the FCC," and then concluded that because "[t]he language says four lines in the relevant density zone[,] the rule should apply on a per-customer, not per-location basis." Multistate Facilitator's UNE Report (August 20, 2001), at 96, *citing UNE Remand Order* ¶ 253. The actual language of the *UNE Remand Order* does not support this reading.

In establishing the exception, the Commission said:

> We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).

UNE Remand Order ¶ 253. The *UNE Remand Order* thus establishes an exception for end users with four or more lines, and that exception applies only within density zone 1 in the top 50 MSAs. Rather than read the reference to density zone 1 as identifying the geographic scope of the exception for unbundled local switching, however, Qwest's preferred reading treats the reference to density zone 1 as further restricting the class of end users – to those with four or more lines *within density zone 1* of a specified MSA. This "4 lines per density zone" reading is not really consistent with Qwest's per-wire-center approach—the two approaches would be consistent only if there were only one wire center for each density zone 1 in each of the 50 largest MSAs. In Denver there are five wire centers which constitute density zone 1, so if the Multistate Facilitator's conclusion that the exception applies to a customer with "four lines in the relevant density zone," were correct, the switching carve-out exception would apply to any customer with four or more lines in those five wire centers, not just within single wire center as the SGAT provision proposes.

The per-wire-center approach also is inconsistent with the Commission's rationale for making a distinction between smaller and larger business customers. A principal material difference the Commission identified as distinguishing small business customers from medium and large business customers is that the larger businesses "are often sophisticated users of telecommunications services that are able to order their operations in a manner that minimizes disruptions that may be caused by coordinated cutovers."[295] By contrast, any business location with one, two, or three lines that loses service on one or more of those lines during a coordinated cutover will be severely disadvantaged, and those consequences will be severe regardless of whether the end-user also does business at a different location somewhere within the same wire-center.

In addition, counting lines on a per-wire-center basis is unreasonable because a per-location basis is the only realistic way to implement the "3 lines or less exception" to an ILEC's obligation to provide unbundled local switching. While a CLEC may know how many lines a customer has at a single location, it may have no reason to know whether an end-user customer has multiple locations, and thus will not know how many lines a customer has within a wire center.[296] Indeed, the customer itself may not know how Qwest accounts for total lines within a wire center, and thus would be unable to tell the CLEC how many lines it has within the footprint of a given wire center.[297] The Commission should therefore hold that Qwest's "wire-

[295] *UNE Remand Order* ¶ 297.

[296] *See* Wilson Decl. ¶ 69.

[297] *Id.*

center" approach fails fully to implement Qwest's obligation to provide unbundled local switching.

2. Qwest Improperly Discriminates Against CLECs By Denying Them High-Quality Packet Switching Functionality.

Qwest also fails to satisfy section 271(c)(2)(B)(vi) by failing to provide unbundled packet switching[298] on a nondiscriminatory basis. The Commission has ruled that where the ILEC has deployed digital loop carrier ("DLC") systems[299] (and where spare copper facilities are not available or adequate) and the ILEC has located its DSLAM in a remote terminal but does not permit CLECs to collocate their DSLAMs in the ILEC's remote terminal on the same terms and conditions that apply to the ILEC DSLAM, the ILEC must provide CLECs with access to unbundled packet switching.[300] Qwest plans to remotely deploy DSLAMs on an increasingly broad scale,[301] and has acknowledged that this deployment will require it to provide CLECs access to unbundled packet switching.[302]

Although Qwest is obligated to provide unbundled packet switching on a non-discriminatory basis, it has flouted that obligation by offering CLECs only the lowest quality ATM connection from the DSLAM to the CLEC equipment.[303] Unspecified Bit Rate Service ("UBRS") is the poorest of five grades of service offered by Qwest to its retail customers,[304] but

[298] Packet switching dividing messages between network users into units called "packets" (also known as "frames" or "cells") and then routing the packets between network users. *UNE Remand Order* ¶ 302. Critical to this process is the Digital Subscriber Line Access Multiplexer ("DSLAM"), which splits voice (low band) and data (high band) signals. *Id.*, ¶ 303. The low band, voice signal is transmitted toward a circuit switch, and the high band, data signal is combined with that of multiple lines in packet format and transmitted to a packet switch, typically ATM or IP. *Id.*

[299] In DLC, some portion of the end user's copper loop is replaced with a fiber segment (or shared copper) at a remote terminal between the end user's premises and the ILEC's switch. *UNE Remand Order* ¶ 313.

[300] *UNE Remand Order* ¶ 313.

[301] *See* Wilson Decl. ¶ 72.

[302] *See* Simpson/Stewart Switching Decl. ¶ 52.

[303] *See* Wilson Decl. ¶ 73.

[304] From best to poorest, the 5 grades of service are: CBR: Constant Bit Rate; VBRrt: Variable BitRate—real-time; VBRnrt: Variable Bit Rate—non real-time; ABR: Available Bit Rate;UBR: Unspecified Bit Rate. *See* Wilson Decl. ¶ 73.

it is the only grade of service Qwest makes available to CLECs and their retail customers. Qwest acknowledges that UBRS is suitable only for "non- real-time applications that are very tolerant to delay, delay variation and cell loss."[305] Thus, the connection that Qwest is providing is only suitable for email and downloading internet information, and not suitable for streaming audio, streaming video, VoIP or other internet-based services that define current high capacity service.[306]

Thus, while Qwest offers multiple grades of service from which its retail customers may select, CLECs and their customers are only offered the worst performing class of service. Such discriminatory treatment precludes a finding that Qwest fulfills is obligation to provide nondiscriminatory access to packet switching.

D. Qwest Denies CLECs Reasonable And Non-Discriminatory Access To Unbundled Local Transport.

Qwest's Idaho, Iowa, Nebraska, and North Dakota SGATs also do not provide CLECs just and reasonable access to unbundled dedicated local transport.[307] Qwest requires CLECs to purchase both Unbundled Dedicated Interoffice Transport ("UDIT") and "Extended Unbundled Dedicated Interoffice Transport" ("EUDIT"). The latter, however, is a flat-rated, non-distance-sensitive charge that serves only to raise the cost of purchasing transport. The improper and unnecessary EUDIT charge has been eliminated by at least two state commissions in the Qwest region, including by Colorado,[308] and the Commission should now confirm that its use in the other four states subject to this joint application violates the requirements of Checklist Item 5.

[305] *Id., citing* Exhibit KLW-ES-6: Qwest Technical Publication 77408, Unbundled Packet Switching, Issue C, January 2002, Paragraph 2.2.2.

[306] *Id.*

[307] *See* SGAT § 9.6.1.1.

[308] *See In re Investigation Into [Qwest's] Compliance With Section 271*, Washington Utils. & Transp. Comm'n Docket Nos. UT-003022 & UT-003040, Twenty-Fourth Supp. Order at 11 (Dec. 20, 2001); Colorado SGAT § 9.6.1.1.

The Commission requires an ILEC to provide "unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers."[309] At a minimum, this requires ILECs to provide unbundled interoffice facilities between "end offices and serving wire centers ("SWCs"), SWCs and interexchange carrier ("IXC") points of presence ("POPs"), tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers."[310] "[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor's collocated equipment."[311] Significantly, the Commission, requires dedicated transport to be recovered through a flat-rated charge,[312] reflecting the general rule that the costs for network elements "must recover costs in a manner that reflects the way they are incurred."[313]

Qwest's EUDIT rates structure violates these rules, because the rate for the EUDIT is non-distance sensitive. Qwest's UDIT charge applies to dedicated transport between Qwest's wire centers. Where, however, a CLEC wants dedicated transport from *its* wire center (or an IXC from its POP) to a Qwest wire center, the CLEC must order EUDIT.[314] Thus, the total price for dedicated transport from a CLEC wire center to a Qwest wire center is the sum of UDIT and EUDIT, rather than the price for the total facility distance based on UDIT alone. EUDIT is a flat-rated, non-distance sensitive charge. In practice, the EUDIT rate is usually identical to Qwest's loop rate, effectively treating the CLEC as if it were an end user instead of a local

[309] *UNE Remand Order* ¶ 323.

[310] *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).

[311] *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).

[312] 47 C.F. R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.

[313] *Local Competition Order* ¶ 743.

[314] *See* Wilson Decl. ¶ 58.

exchange carrier. By imposing the EUDIT charge on competitors, Qwest greatly increases the total cost of obtaining unbundled transport.[315]

Qwest's EUDIT charge violates its checklist obligations because it fails to reflect the way costs are incurred. There is no basis in either economics or engineering for distinguishing between the transport between the CLEC's switch and the first Qwest wire center (called the "serving wire center" or SWC by Qwest) and the transport between Qwest's wire centers.[316] As such, there is no basis for creating separate UDIT and EUDIT charges.

Indeed, the EUDIT charge deters CLECs from building facilities to a meet point between a CLEC wire center and the Qwest SWC. Because the EUDIT is not distance-sensitive, a CLEC will have to pay the entire EUDIT charge even if it builds facilities out to some point closer to the Qwest SWC.[317] If the CLEC must pay the entire EUDIT rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This alone demonstrates that the EUDIT is not cost-based, as required under § 252(d) of the Act.

Qwest's scheme is also discriminatory. Qwest permits CLECs to use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement, which is priced on a fixed and per mile basis.[318] Thus, if a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT.[319] If a CLEC wants dedicated transport to connect a Qwest wire center to the CLEC's own wire center, however, it must use a non-distance

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[315] *Id.*

[316] *See* Wilson Decl. ¶ 59.

[317] *See* Wilson Decl. ¶ 60.

[318] *See* Wilson Decl. ¶ 61.

[319] Qwest made this concession because that is how it has always treated neighboring independent LECs. *See* Wilson Decl. ¶ 61.

sensitive EUDIT.[320] For all these reasons, Qwest's imposition of EUDIT charges deny CLECs reasonable and nondiscriminatory access to unbundled local transport.

E. Qwest Denies CLECs Reasonable Access To Unbundled Dark Fiber By Impermissibly Applying The Commission's Test For Use Restrictions on EELs.

All five of Qwest's SGATs unlawfully restrict the use of dark fiber by applying the "use restrictions" test that the FCC adopted for Enhanced Extended Links ("EELs"), which are loop-transport combinations that are already combined in the ILECs' network.[321] The use restrictions have no possible application to dark fiber, because CLECs by definition always light (and generally combine) unbundled dark fiber themselves.

The Commission's use restrictions on EELs have only limited application. As the Commission noted in the *Supplemental Order Clarification* (¶ 2), "incumbent LECs routinely provide the functional equivalent of combinations of unbundled loops and transport network elements (also referred to as the enhanced extended link) through their special access offerings." As the Commission further explained, 47 C.F.R. § 51.315(b) "precludes the incumbent LECs from *separating* loop and transport elements that are *currently combined*," and therefore absent a special restriction "a requesting carrier could obtain these combinations at unbundled network element prices." *Id.* (emphasis added). Because the Commission had certain concerns about the ability of CLECs to convert existing loop-transport combinations to UNEs, the Commission adopted an interim rule that prohibits CLECs from converting such combinations to UNEs unless the CLEC is providing a "significant amount of local exchange service."[322] The use restrictions

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[320] *Id.*

[321] *See* SGAT § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a loop-transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC").

[322] *See id.* ¶ 1.

do not apply, however, when the CLEC combines loop and transport itself in its own collocation, as Qwest itself has acknowledged.[323]

Accordingly, the Commission's use restrictions do not apply to dark fiber. By definition, CLECs light and usually combine dark fiber themselves in their own collocation cages. Therefore, Qwest's attempts to restrict the availability of unbundled dark fiber are patently unlawful.

F. Qwest Denies CLECs Nondiscriminatory Access To The NID.

Qwest's denial of reasonable, nondiscriminatory access to the network interface device (NID) is particularly anticompetitive. Although a CLEC may win a new customer and be anxious to establish facilities-based service for that customer, Qwest's policies can make it impossible for the CLEC to do so. That is because Qwest refuses to permit the removal of its unused loops from the protector side of the NID to make room for a CLEC that wins the customer to attach its loops.[324]

This issue arises principally in the context of AT&T's cable telephony offerings, where AT&T seeks to provide its own loops to multi-tenant dwellings. It is often the case that such buildings have covenants that prohibit competitors from installing an additional NID. In those instances, AT&T must have access to the protector side of the Qwest NID. Absent such access, AT&T cannot serve the customer.[325] Indeed, it is particularly costly and unreasonable for a CLEC to take its own loop facilities all the way to a customer's building only to find out that it can neither install a new NID nor use the protector side of the Qwest NID.

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[323] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of Qwest at 6 (April 5, 2001) ("A competitive LEC can combine its UNE high-capacity loops with its UNE high-capacity transport at its collocation space to create a complete circuit to be used for exchange access purposes. This ability is not at issue in this proceeding").

[324] *See* SGAT § 9.5.2.1 and 9.5.2.5.

[325] Wilson Decl. ¶ 54.

Under Qwest's SGATs, however, a CLEC may use that NID only if space permits. Where, as is often the case, Qwest's unused loops remain attached to the only available terminals, Qwest refuses to remove, or let CLECs remove, those unused loops. Although Qwest purports to advance a "safety" rationale for this refusal, there is in reality no valid "safety" objection at all.[326] The Commission should therefore rule that, where CLECs can provide facilities-based service to a customer only through accessing a single, existing NID, an ILEC may not block such access by refusing to allow the removal of its unused loops.

G. Qwest Fails To Make DSL Available For Resale On Reasonable And Nondiscriminatory Terms And Conditions.

Checklist item 14 states that a BOC must make "telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3)." Section 251(c)(4) imposes on incumbent LECs the duty to "offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The Commission has held that these requirements apply fully to the retail sale of digital subscriber line ("DSL") based telecommunications services.[327] Qwest has not satisfied its resale obligations because it has failed to offer for resale the DSL-based services that it provides to the Microsoft Network, L.L.C. ("MSN"), an Internet service provider ("ISP").

An investigation by the Minnesota Department of Commerce ("DOC") has revealed that Qwest has entered into an arrangement with MSN whereby Qwest is selling DSL transmission services to MSN pursuant to its publicly-filed tariff, but is also providing typical retailing

[326] Wilson Decl. ¶ 55.

[327] *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-330, CC Docket No. 98-147, ¶ 3 (1999) ("1999 Second Advanced Services R&O") ("we conclude that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the . . . discounted resale obligation"), *aff'd*, *ASCENT* v. *FCC*, 253 F.3d 29 (D.C. Cir. 2001).

functions, including marketing the service to end-users, billing end-users, and collecting payment from end-users, pursuant to off-tariff, non-public arrangements with MSN. The precise nature of these arrangements is not yet known because Qwest has not disclosed the actual contracts and has provided only the barest descriptions of what they contain. The information it has disclosed, however, confirms that Qwest is providing a service "at retail," and, therefore, that it is violating the Act's resale requirements because it is not making that service available to other telecommunications carriers at wholesale rates. Accordingly, on the current record, the Commission cannot make a reasoned finding that Qwest (which has the burden of proof) has demonstrated compliance with its resale obligations.

Rather than bring its agreements into the light of day, Qwest instead filed a Petition for Declaratory Ruling with the Commission, seeking a ruling that the Act's resale obligations do not apply "to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP."[328] Qwest's Petition makes two legal arguments in support of its attempt to escape statutory resale obligations, neither of which has merit. First, Qwest argues that its arrangement with MSN falls into a narrow exception to the general resale rules providing that DSL services "sold to [ISPs] as an input component to the [ISPs'] retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale."[329] Far from supporting Qwest's position, Rule 605(c) forecloses it. This rule permits ILECs to resell bulk DSL services to ISPs without also offering those services for resale, but that exception to the Act's resale requirement applies *only* where the particular service is one in which the ISP "that purchases a bulk DSL service must

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[328] See Petition for Declaratory Ruling, Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act, WC Docket No. 02-77, at 14 (filed April 3, 2002) ("Petition").

[329] 47 C.F.R § 51.605(c). *See* Petition at 8-11.

itself, rather than the incumbent, provide . . . typical retail services to the ultimate consumer."[330] The "typical retail services" identified by the Commission included "sole responsibility for marketing, ordering, installation, maintenance, repair, billing, and collections vis-à-vis the end-user subscriber."[331] Because Qwest is providing these quintessential retail functions to end users, the DSL-based services that it is providing to MSN do not fall within the Rule 605(c) exception and therefore are subject to the Act's resale requirements.

Qwest alternatively claims that the Internet access service that customers purchase under Qwest's arrangement with MSN is a bundled information service (rather than a telecommunications service) and that Qwest has no resale obligation with respect to that service because § 251(c)(4) applies only to telecommunications services.[332] This claim ignores that the service at issue is not the Internet service that is provided to subscribers, but rather the DSL service Qwest provides to MSN. And that service plainly is a telecommunications service, as the Commission has already expressly and properly held.[333] Qwest therefore has an obligation to offer for resale at wholesale rates that DSL-based transport service, and its failure to do so precludes a finding of compliance with checklist item 14.

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY.

"As a pre-condition to entry under section 271,"[334] Qwest and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the

[330] 1999 Second Advanced Services R&O ¶ 15 (emphasis added).

[331] *Id.* (emphases added).

[332] Qwest PSC Petition at 12-14.

[333] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, ¶¶ 11, 66-67 (1998); Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd. 19237, ¶ 3 (1999); *ASCENT*, 235 F.3d at 668 ("Congress did not treat advanced services differently from other telecommunications services").

[334] *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 2.

requirements of section 272."[335] As the Commission has frequently stressed, "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[336]

Qwest and its section 272 affiliate, QCC, wholly fail to meet their burden. In fact, earlier this year an Administrative Law Judge for the Minnesota Commission ("Minnesota ALJ"), facing virtually the same Qwest declarations and supporting materials on section 272 compliance that are now before this Commission, found that Qwest had failed to meet its burden to establish *six* of the fundamental requirements imposed under section 272. Specifically, the ALJ ruled that Qwest failed to show that it and its section 272 affiliate operated independently, as required by § 272(b)(1), had separate officers and directors, as required by § 272(b)(3), had dealt with each other on an arms length basis, as required by § 272(b)(5), had adequately disclosed their transactions, as required by § 272(b)(5), had met the nondiscrimination obligations required by § 272(c), or had met the joint marketing requirements imposed by § 272(g).[337]

Qwest's application is silent on the violations identified by the Minnesota ALJ, and instead relies, fundamentally, on "paper promises" that it will comply with the requirements of § 272. Qwest thus cannot be found to have met its burden of establishing § 272 compliance, which provides an "independent ground[] for denying [this] application."[338]

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[335] § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that "paper promises" cannot satisfy the BOC's burden under § 271).

[336] *Texas 271 Order* ¶ 395 (quoting Michigan 271 Order ¶ 346).

[337] *In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272),* Minnesota Pub. Util. Comm., Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002) (hereinafter "Minnesota ALJ Findings") (Attachment 7, hereto). The Minnesota Commission has not yet rule upon the Minnesota ALJ's findings and recommendations. Although Qwest's current application does not include Minnesota, the issues raised in evaluating section 272 compliance are unaffected by state by state differences, as the Commission previously has recognized. *E.g. Verizon Pennsylvania Order*, ¶ 124 (finding section 272 compliance based on compliance established in Verizon earlier applications from different states).

[338] *New York 271 Order* ¶ 402. Qwest's reliance on reviews conducted by Arthur Andersen and KPMG to establish section 272 compliance is misplaced. *See, e.g.*, Schwartz Decl. ¶¶ 24-27. First, as Qwest acknowledges, the KPMG

A. Qwest And QCC Have Not Established That They "Operate Independently" As Required By Section 272(b)(1).

Section 272(b)(1) requires that a BOC and its long distance affiliate "operate independently," meaning, among other things, that the BOC and section 272 affiliate may not jointly own switching and transmission facilities or perform operation, installation, or maintenance ("OIM") services on each other's facilities.[339] The Minnesota ALJ held that Qwest and QCC had not established compliance with these requirements, and nothing new has been presented to this Commission to justify changing this conclusion.[340]

Like here, Qwest's affiants before the Minnesota ALJ promised that Qwest and QCC would not jointly own switching and transmission facilities.[341] The ALJ properly held that such bare promises did not meet Qwest's burden, noting that Qwest had "not presented documentary evidence that supports its assertion," and had not provided any "description of Qwest's asset deployment plan within its network strategy."[342] So too here, Qwest presents simple pledges to follow the law, without substantiating such claims with tangible evidence or a broader description of its network ownership plans.[343] Absent any further evidence or elaboration (whether, for example, Qwest and QCC intend to utilize any network facilities of Qwest

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review concerns only its alleged compliance with sections 272(b)(2), 272(b)(5), and 272(c)(2), and thus is irrelevant to the Minnesota ALJ's findings of noncompliance under sections 272(b)(1), 272(b)(3), 272(c)(1), and 272(g). *See* Schwartz Decl. ¶ 24. Moreover, KPMG's report (which concerned the period from April 1, 2001 to August 31, 2001) found that Qwest was *noncompliant* with sections 272(b)(2), 272(b)(5), and 272(c)(2), citing four instances when Qwest did not comply with the affiliate transaction pricing rules, and eight instances when the Company did not process accounting entries and affiliate billings and did not reduce to writing certain services provided between Qwest and the affiliate. *See* Schwartz Decl. ¶ 24 and Exh. MEH-272-3. Although Qwest characterizes these errors as minor and says they have been corrected, *see* Schwartz Decl. ¶¶ 25-27, such previous findings of noncompliance, coupled with the fact that no similar review was conducted by KPMG in advance of Qwest's current application, renders the old KPMG report of limited relevance to Qwest's claim of section 272 compliance.

[339] *See Non-Accounting Safeguards Order* ¶ 163; *Non-Accounting Safeguards Third Order on Reconsideration* ¶ 20.

[340] *See* Minnesota ALJ Findings ¶¶ 25-31; *see also* Selwyn Minnesota Aff. ¶¶ 27-30. L. Selwyn submitted an affidavit before the Minnesota ALJ on section 272 issues on behalf of the Minnesota Department of Commerce (hereinafter "Selwyn Minnesota Aff.") (Attachment 8, hereto).

[341] *See* Minnesota ALJ Findings ¶ 26.

[342] *Id.* ¶ 29.

[343] *See* Schwartz Decl. ¶¶ 39-42; Brunsting Decl. ¶¶ 27-28.

affiliates, and, if so, whether they agree that section 272(b)(1) bars their joint use of such facilities), Qwest cannot be said to have established compliance with section the "operate independently" requirement.

Similarly, Qwest and QCC promise, again without evidence or elaboration, that they will not provide OIM services for each other's facilities.[344] No detail is provided as to how such OIM services will in fact be provided in order to substantiate their claims. (Curiously, Qwest pointedly uses only the future tense when describing OIM services of QCC's facilities.[345] Like the Minnesota ALJ, the Commission should call on Qwest to present tangible evidence to establish compliance with section 272(b)(1), not just promises.

B. Qwest Has Not Established Compliance With The Separate-Employees Requirement Of Section 272(b)(3).

Under section 272(b)(3), a BOC and its section 272 affiliate must have "separate officers, directors, and employees." This requirement is intended to ensure, among other things, that the BOC and its section 272 affiliate are truly separate operating entities with "independent management and control of the two entities."[346]

Qwest cannot meet its burden under section 272(b)(3), as it asserts, simply by submitting lists of its current officers and directors and declaring that the payrolls for Qwest and QCC contain no overlapping names.[347] For example, a BOC-paid employee could not properly be deemed "separate" if he reports to a QCC supervisor and works day-to-day alongside QCC employees, and a section 272 affiliate's board cannot be deemed separate if it is comprised entirely (as here) of officers of the BOC parent.

[344] Schwartz Decl. ¶ 42; Brunsting Decl. ¶ 27.
[345] *See* Brunsting Decl. ¶ 27(c) & (d)).
[346] *Michigan 271 Order* ¶ 360.